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Supreme Court, U.S.
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In The Supreme Court Of The United States

October Term, 1994

CHARLES MEKKAM,

Petitioner,

v.

OREGON HEALTH SCIENCES UNIVERSITY and DOUGLAS McDONALD,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of The State of Oregon

PETITION FOR WRIT OF CERTIORARI

Richard C. Busse
(Counsel of Record)
Scott N. Hunt
LAW OFFICES OF
RICHARD C. BUSSE
521 American Bank Building
621 S.W. Morrison Street
Portland, Oregon 97205
(503) 248-0504

Counsel for Petitioner

66 pp

QUESTIONS PRESENTED FOR REVIEW

1. In an action under 42 U.S.C. § 1981 which pre-dated the 1991 Civil Rights Act, where the plaintiff pleaded and proffered evidence that he was denied a promotion based upon race, and no motion was made against the claim on grounds of evidentiary insufficiency, does this Court's decision in Rivers v. Roadway Express, Inc., ____ U.S. ___, 114 S.Ct. 1510, 128 L.Ed. 2d 274 (1994) affect the viability of the pre-act promotion claim?

2. Where a party has secured a judgment of a federal law claim against a state university is it a denial of due process and equal protection of law under the Fourteenth Amendment of the United States Constitution for the State's judicial branch to refuse to apply its own procedural rules and cause that judgment to be reversed on an issue not raised at trial?

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Richard C. Busse
(Counsel of Record)
Scott N. Hunt
LAW OFFICES OF
RICHARD C. BUSSE
521 American Bank Building
621 S.W. Morrison Street
Portland, Oregon 97205
(503) 248-0504

Counsel for Petitioner

Petitioner Charles Mekkam ("Petitioner") respectfully prays that a Writ of Certiorari issue to review the decision dated May 16, 1995 of the Oregon Supreme Court denying review of the decision of the Court of Appeals of the State of Oregon dated January 25, 1995.

OPINIONS BELOW

The Opinion of the Court of Appeals of the State of Oregon was filed on February 23, 1994. That decision was vacated by the Oregon Supreme Court on August 25, 1994 in light of Rivers v. Roadway Express, Inc., _____ U.S. ____, 114 S.Ct. 1510, 128 L.Ed. 2d 274 (1994). The Oregon Court of Appeals filed its opinion on remand on January 25, 1995. The Opinion of the Oregon Court of appeals reversed the judgment against Oregon Health Sciences University and affirmed the judgment against the individual defendant. The Oregon Supreme Court denied review on May 16, 1995.

JURISDICTION

The Oregon Supreme Court denied Petitioner's petition for reconsideration on July 18, 1995 following its denial of Petitioner's petition for review, on May 16, 1995. Petitioner had sought review of the Oregon Court of Appeals' decision filed January 25, 1995, in which the judgment against Oregon Health Sciences University was reversed. The Appellate Judgment was entered August 8, 1995.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner proceeded under 42 U.S.C. § 1981, which provides in part:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of

> persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

The Fourteenth Amendment of the United States Constitution provides in part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

SUMMARY OF THE CASE

Plaintiff, a black native of Nigeria, was employed at Oregon Health Sciences University ("OHSU") as an accountant clerk in 1986. His job was to review OHSU's telephone bills for accuracy, pay them and recoup the payments from the various OHSU departments. He also worked with those departments on billing problems. He was an outstanding employee. In 1987 he received a rating of "excellent" with notations referencing his outstanding work.

In 1990 after OHSU instituted a new computerized on-line telephone billing system, Plaintiff's job changed dramatically. OHSU began to purchase its own telephone equipment and he had to devise a way to recover the capital cost of that investment from customers. In addition, the goals of the organization changed and he had to become concerned not only with cost recovery, but also with making a profit. He also provided high-level administrative support to the organization. His job functions increased after the conversion. He began attending management meetings and made recommendations about problems and projections and functioned as liaison between OHSU and departments that were not located on the main campus in Portland.

Because he was doing work above his classification Plaintiff sought a reclassification of his position. At the time of the conversion he was classified an accounting technician, salary range 15. Because this classification was not an accurate reflection of his duties and responsibilities, he utilized a union mechanism to attempt to obtain a reclassification. However, because the system was

restricted so that to prevail he had to identify another job already in existence and his job was unique, that effort failed.

At the same time everyone in his department that was affected by the change in the organization was reclassified except Plaintiff. While others received management's support for a reclassification to non-existent job classifications, Plaintiff did not receive that support. While others had job titles created for them he did not receive the same treatment. An organization chart had been created and approved which showed that Plaintiff was to be made Tele-Database Administrator. But, instead of adding that new title to the new list of titles, as was done with others, Plaintiff was told that could not be done for him. His supervisor refused to create a new job description for him.

The position Plaintiff was seeking through his reclassification efforts would have been one which was significantly higher than his existing job title. The administrative specialist job was a higher-ranking position.

The difference in salary between his grade 15 job and the grade 20 telecommunications analyst job was $471.00 per month.

Plaintiff spoke with his supervisor, McDonald, about this situation on August 3, 1990, and again on September 4, 1990 after he discovered that an inventory clerk on a salary schedule 11 who had been doing data input and providing assistance to Plaintiff had actually passed him and was now being reclassified as a Tele-communications Analyst at salary schedule 20. Both had been listed as database administrators on the January 1990 organization chart. He received no relief.

In September 1990 Plaintiff filed a complaint with the affirmative action office at OHSU. Mr. Ray Ruiz, OHSU's Affirmative Action Officer, testified that Plaintiff's complaint had presented a prima facie case of race discrimination and Mr. Ruiz developed a pre-settlement agreement dated November 30, 1990. That document noted that McDonald had admitted that he knew of no comparable position to Plaintiff's at any other institution and that as of

November 28, 1990 still no job description existed for Ms. Fox, the person who was being promoted to telecommunications analyst. Mr. Ruiz wondered how Ms. Fox could obtain the upward reclassification when she still did inventory and phone location work and had no job description. Mr. Ruiz proposed a settlement that Plaintiff simply be given a position equivalent to that held by Ms. Fox. McDonald received the proposal on November 30. Mr. Ruiz asked McDonald for a response to his proposal by December 5, 1990.

On December 4, 1990, one day before he was to respond to Mr. Ruiz, McDonald issued a layoff notice to Plaintiff. It said "Due to the automation of the billing system, it is necessary to reduce the staff...you will be laid off effective the end of your shift on January 4, 1991." His layoff was later extended to February 8, 1991.

The subject of Plaintiff's removal had come up at previous management meetings at OHSU. It was suggested in those meetings that it might be very difficult to get rid of Plaintiff because of his race and that management would

probably have to eliminate the position and rewrite it, by taking his job description and closing it out and after he was gone rewriting it to bring in somebody to do his functions. A former manager at OHSU who was a witness to those meetings believed that Plaintiff's race was a consideration in how he was regarded.

At trial Defendants made only four motions for directed verdict: (1) that for purposes of all claims there was no discharge; (2) that McDonald should be dismissed from all claims, including the Section 1981 claim, because he was merely the alter ego of OHSU; (3) that the evidence in support of Plaintiff's claims for punitive damages was insufficient; (4) that the 1991 Civil Rights Act was not retroactive. Defendants did not move for directed verdict on the ground that Plaintiff failed to establish sufficient evidence to support his failure to promote claim or to otherwise challenge the failure to promote theory under Plaintiff's Section 1981 claim.

The Court of Appeals ignored that failure and went on to hold that "plaintiff's failure to promote theory was not

actionable under the 1988 version of Section 1981." Mekkam v. Oregon Health Sciences Univ., (Mekkam I), 126 Or.App. 484, 489, 869 P.2d 363 (1994). That portion of its opinion was adopted on remand. The Oregon Supreme Court, with one dissenter, denied review.

REASONS FOR GRANTING THE WRIT

Promotion claims under section 1981 were viable before the 1991 Civil Rights Act even under Patterson v. McLean Credit Union, 491 U.S. 164, 109 S.Ct. 2363, 105 L.Ed. 2d 132 (1989), under certain circumstances. In this case there was evidence of a racially motivated promotion denial. No motion was made against that claim on grounds of evidentiary insufficiency. Yet the Oregon Court of Appeals ruled that the evidence was insufficient to qualify under Patterson because there was no evidence that Plaintiff "assumed supervisory duties." Mekkam I, supra, 126 Or.App. at 490. The Court of Appeals misapplied Patterson and never should have reached the question at all because Defendants failed to preserve error on that issue. It was a

denial of due process and equal protection for the Court to have reached this question.

A. THE COURT OF APPEALS ERRED IN CONSIDERING FOR THE FIRST TIME ON APPEAL DEFENDANTS' CHALLENGE TO THE EVIDENCE SUPPORTING PLAINTIFF'S FAILURE TO PROMOTE CLAIM IN PLAINTIFF'S SECTION 1981 ACTION.

1. Defendants' Motion For Directed Verdict Due To The Non-Retroactivity Of The Civil Rights Act Of 1991 Did Not Preserve A Challenge On The Grounds Of Evidentiary Insufficiency To The Failure To Promote Portion Of The Section 1981 Claim.

Defendants moved for directed verdict against the Section 1981 claim with respect to the inclusion of the individual defendant, with respect to the discharge claim within it, and because they claimed the 1991 Act was not retroactive, but they never moved against the failure to promote claim within the Section 1981 claim on grounds of evidentiary insufficiency. The only motion for directed verdict which addressed more than one aspect of the Section 1981 claim was on the specific ground that the 1991 Act

was not retroactive. Since a failure to promote claim was actionable before the enactment of the 1991 Act under some circumstances, Defendants never asked the Court to rule on the evidentiary sufficiency of the failure to promote aspect of Plaintiff's Section 1981 claim under the law which Defendants contended applied. When a party does not raise the issue in its motion for directed verdict, the appellate court should not consider it. Kabban v. Mackin, 104 Or.App. 422, 433, 801 P.2d 883 (1990); Vancil v. Poulson, 236 Or. 314, 320, 388 P.2d 444 (1964); NW Pacific Indemnity v. Southern Pacific, 296 Or. 365, 372 n. 1, 677 P.2d 671 (1984) ("A motion for a directed verdict is not the proper vehicle for asking the trial court to decide as a matter of law that the movant is entitled to prevail on less than all of the elements of a claim."); Remington v. Landolt, 273 Or. 297, 302, 541 P.2d 472 (1975) (grounds not stated at the time of motion will not be considered by appellate courts); Investors Equity Exchange, Inc. v. Whiteley, 269 Or. 309, 313-14, 524 P.2d 1211 (1974); ORAP 5.45. Defendants did not preserve a challenge on grounds of

evidentiary insufficiency to the failure to promote aspect of the Section 1981 claim, and did not allow the trial court the opportunity to rule on the issue below. Therefore, the Court of Appeals erred when it considered for the first time on appeal Defendants' challenge to the failure to promote claim on that ground.

Defendants did not claim at trial that there was insufficient evidence to support the failure to promote claim. They should not be allowed to prevail on appeal based upon that new argument. Vancil v. Poulson, supra, 236 Or. 320. Since the issue of insufficient evidence was not properly preserved, the Court of Appeals erred when it originally held: "In sum, plaintiff's failure to promote theory was not supported by evidence that would allow him to recover under 42 U.S.C. § 1981 (1988)." Mekkam I, supra, 126 Or. App. at 490.

2. Defendants Had The Burden To Move Against Plaintiff's Promotion Theory On The Basis Of Insufficient Evidence.

Under Patterson, denial of promotion claims were actionable under pre-1991 Act law under certain

circumstances. Patterson v. McLean Credit Union, supra, 491 U.S. 164; Sitgraves v. Allied-Signal, Inc., 953 F.2d 570, 574-75 (9th Cir. 1992).

Here there was evidence that Plaintiff was denied a promotion, and that it was therefore incumbent on Defendants to move against the promotion claim on the grounds of evidentiary insufficiency.

There was evidence that Plaintiff was denied a promotion because of his race. The jury could have found that OHSU should have promoted Plaintiff in 1990 because he had assumed new duties; the conversion had caused his job functions to increase; he was working above his classification without being paid for it; the work included providing high-level advice and administrative support to the organization; the change in job title would be to a "significantly higher" position, to a new job that previously had not existed at OHSU and which would have required the negotiation of a new job title through the collective bargaining process. The jury could have found that others received management's support for reclassification while he

did not. On occasion new job titles were created, or persons were reclassified to nonexistent job classifications, but Plaintiff was refused that favored treatment. The jury could have found that Plaintiff and other minorities were disfavored in the department.

Because no motion was made against the failure to promote claim on the grounds of evidentiary insufficiency, it was not proper for the Court of Appeals to reverse the trial court based upon insufficient evidence.

The Court of Appeals originally relied upon Sitgraves v. Allied-Signal, Inc., 953 F.2d 570, 573 (9th Cir. 1992), to hold such increase in pay and duties are typical of an ordinary promotion and failed to amount to an opportunity to form a new contractual relationship. Mekkam I, supra, 126 Or.App. 489-90. The court reasoned there is no evidence Plaintiff assumed supervisory duties. On remand the court simply adopted and incorporated its original analysis. Mekkam II, 132 Or.App. 470, 473, 888 P.2d 1093 (1995).

There are three problems with the Court of Appeals' analysis. First, in Sitgraves the Ninth Circuit did not establish an exclusive list of factors; rather, it rules one set of factors present in the case satisfied the new contractual relationship standard imposed in Patterson v. McLean Credit Union, 491 U.S. 164, 109 S.Ct. 2363 (1989), and that another set of factors did not. See Hooks v. Diamond Crystal Specialty Foods, Inc., 997 F.2d 793, 802 (10th Cir. 1993) (the situations in Sitgraves are not definitive, but rather illustrative of criteria to be employed in the qualitative change analysis). In Sitgraves the Ninth Circuit held one set of employees did not have an actionable claim when the promotion they sought was simply to a more skilled position with higher pay, because essential terms of the contractual relationship would not have been affected. Sitgraves, supra, at 574. However, the holding did not establish what factors must be altered to satisfy the Patterson standard. See Rodriguez v. General Motors Corp., 27 F.3d 396, 400 (9th Cir. 1994); Cf. Mallory v. Booth Refrigeration Supply Co., Inc., 882 F.2d 908, 910 (4th Cir.

1989). The Court of Appeals' implication that an assumption of supervisory duties would be necessary under Sitgraves is simply too restrictive a reading.

Here, in addition to the increased duties and pay, the reclassification was sought because Plaintiff was giving high-level advice and administrative support. In addition, there was evidence the change in job title represented a "significantly higher" position; to a new job title that previously had not existed at OHSU; and, would have necessitated the negotiation of a new title and pay through the collective bargaining process. The reasoning in Sitgraves supports a finding that the combination of the factors present here amount to a position involving a new contractual relationship. At the very least a jury question was presented on that issue, and Defendants did not request a jury instruction which called upon the jury to consider any of the Patterson factors.

Second, the Court of Appeals' analysis failed to recognize the importance and account for the requirement that a new job title had previously not existed at OHSU; that

the job was unique and without comparators; and, that the creation of the new classification and salary range would have normally involved negotiations with the union as part of the collective bargaining process. If OHSU had followed that process of reclassification through union negotiation the promotion would have required an amendment to the collective bargaining agreement and therefore a new contractual relationship.

Finally, the Court of Appeals ignored Plaintiff's objection that Defendant was raising the issue of the evidentiary insufficiency of the failure to promote claim for the first time on appeal. Because Defendants never made a motion on the "basis of evidentiary insufficiency against the failure to promote claim under the law it contended applied, the Court of Appeals never should have considered the sufficiency of the evidence on that issue.

3. As The Trial Court Denied Defendants' Motion For Directed Verdict On The Section 1981 Claim Its Ruling On That Motion Should Be Upheld If It Was Right, Even If Not For That Reason.

The trial court noted that the motion for directed

verdict was made "on the specific ground that the 1991 Civil Rights Act should not be applied retroactively." It denied the motion on that specific ground. Its ruling on that motion should be upheld if it was right, even if not for that reason. Zollinger v. Warner, 286 Or. 19, 24, 539 P.2d 1107 (1979); Artman v. Ray, 263 Or. 529, 532-34, 501 P.2d 63, opinion clarified, 263 Or. 534, 502 P.2d 1376 (1972). The trial court was right in denying the motion because the grounds stated for the motion to dismiss the entire claim were inadequate. The only relevant ground that was asserted was that the 1991 Act was not retroactive. Even if it were so that the 1991 Act was not retroactive, that ground would not address that portion of the claim relative to the promotion claim under pre-1991 Act law. The only way to address the promotion claim under pre-1991 Act law was to make a motion for directed verdict on grounds of evidentiary insufficiency. That motion was not made. Since the motion was not made the trial court was correct in denying the motion on the specific ground asserted. The trial court's ruling on that issue should be upheld. The

Oregon appellate courts should be reversed on that issue.

B. IT WAS A DENIAL OF DUE PROCESS AND EQUAL PROTECTION OF LAW FOR THE OREGON APPELLATE COURTS TO IGNORE THAT STATE'S PROCEDURAL RULES TO INVALIDATE A JUDGMENT AGAINST A COORDINATE STATE AGENCY.

Plaintiff was entitled to due process and equal protection of the laws. When the Oregon Appellate Court failed to follow their own procedure rules in favor of a coordinate state agency they violated his Federal Constitutional rights in that respect.

The federal guaranty of due process extends to state action through its judicial as well as through its other branches of government. Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 680, 50 S.Ct. 451, 454, 74 L.Ed. 1107 (1930). Even though states may not be required to create an appellate system, once created any appellate system must comply with the principles of due process. Evitts v. Lucey, 469 U.S. 387, 401, 105 S.Ct. 830, 838-39, 83 L.Ed. 2d 821 (1985).

Here, Petitioner had a property right to the judgment

obtained in the trial court, which once obtained he could not be deprived without due process. See Logan v. Zimmerman Brush Co., 455 U.S. 422, 428-31, 102 S.Ct. 1148, 1154-55, 71 L.Ed. 2d 265 (1982) (an administrative claim of discrimination has sufficient value to be labeled proeprty).

This Court has held that a state court cannot reconfigure its remedial scheme in mid-course where the reconfiguration denies an individual a previously established remedy. Reich v. Collins, 513 U.S. ____, 115 S.Ct. 547, 550, 130 L.Ed. 2d 454, 459-60 (1994) (regarding invalid tax collections, although due process allows a state to maintain a remedial tax scheme that is exclusively pre-depravation, exclusively post-deprivation, or a hybrid, and to reconfigure its scheme over time to fit changing needs, it may not do what the Georgia court did, that is bait and switch in mid-course). Likewise, this Court has held that an asserted local appellate procedural rule could not be used to defeat this court's jurisdiction where the application of the rule could not be reconciled with the state court's unambiguous previous rulings that did not require following

the procedural rule asserted. NAACP v. Alabama ex.rel. Patterson, 357 U.S. 449, 454-57, 78 S.Ct. 1163, 1168-69, 2 L.Ed. 2d 1488 (1958).

The analogous principle, that a state court cannot ignore a previously established procedural rule in order to deny an individual rights to a judgment, applies to this case. Here, the requirement of preservation of error is unambiguously established in Oregon Rules of Appellate Procedure, ORAP 5.45, and the case law cited above in section A.1. See, e.g. Kabban, supra, Vancil, supra, Remington, supra. However, the Oregon Court of Appeals ignored this requirement of appellate procedure to reverse the trial court on Petitioner's Section 1981 claim. In so doing the court switched its remedial scheme in mid-course and deprived Petitioner of due process. See NAACP, supra, 357 U.S. at 454-57; Reich, supra, 130 L.Ed. 2d at 459.

The additional factor present here, that Defendant OHSU is a state agency, raises an equal protection issue. Since the established rule was ignored where the Defendant was a coordinate state agency, Petitioner as a public employee/plaintiff was denied equal protection of the laws. See Logan, supra 455 U.S. at 438-40, 102 S.Ct. at 1159-60 (Blackmun, J., concurring) (statutory creation of two classes of discrimination claims raises an equal protection issue).

CONCLUSION

Respondent failed to make a motion against Plaintiff's promotion claim on evidentiary grounds, and the Oregon Court of Appeals should not have supplied that missing motion. In so doing, Petitioner's due process and equal protection rights were violated. In any event, the Oregon Court of Appeals misapplied Patterson v. McLean Credit Union.

For these reasons, Petitioner respectfully prays that a writ of certiorari issue to review the Judgment and Opinion of the Oregon Court of Appeals.

Respectfully submitted,

Richard C. Busse
Scott N. Hunt
LAW OFFICES OF
RICHARD C. BUSSE
521 American Bank Building
621 S.W. Morrison Street
Portland, Oregon 97205
(503) 248-0504

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FILED: February 23, 1994

IN THE COURT OF APPEALS
OF THE STATE OF OREGON

CHARLES MEKKAM,

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v.

OREGON HEALTH SCIENCES UNIVERSITY
and DOUGLAS McDONALD,

Appellants.

(9103-01566; CA A75085)

Appeal from Circuit Court, Multnomah County.

Robert P. Jones, Judge.

Argued and submitted April 16, 1993.

Jas. Adams, Assistant Attorney General, argued the cause for appellants. With him on the briefs were Charles S. Crookham and Theodore R. Kulongoski, Attorneys General, and Virginia L. Linder, Solicitor General.

Richard C. Busse argued the case for respondent. With him on the brief was Scott N. Hunt.

Before Rossman, Presiding Judge, and De Muniz and Leeson, Judges.

DE MUNIZ, J.

Judgment against Oregon Health Sciences

University on wrongful discharge claim reversed; otherwise affirmed.

DE MUNIZ, J.

Plaintiff sued defendant Oregon Health Sciences University (OHSU) under 42 USC § 1981 and for common law wrongful discharge. He alleged that he had suffered pay disparity and was not promoted because of his race. He also alleged that OHSU laid him off because he filed a racial discrimination complaint with OHSU's affirmative action office. Plaintiff also sued his supervisor, defendant McDonald, alleging that McDonald intentionally interfered with an employment contract between OHSU and plaintiff for the improper purpose of racial discrimination. The trial court denied defendants' motions for directed verdicts on plaintiff's claims. The jury found for plaintiff on each of his claims. It awarded plaintiff general and punitive damages against OHSU on the section of 1981 and wrongful discharge claims. In addition, it awarded him general and punitive damages against McDonald on the intentional interference with contract claim.[1]

Defendants assert on appeal that the trial court erred in denying their directed verdict motions. We view the evidence in the light most favorable to plaintiff and will reverse only if there is no evidence from which the jury could have found for him. Brown v. J.C. Penney Co., 297 Or 695, 705, 688 P2d 811 (1984). Plaintiff was born in Nigeria. He began working for OHSU in 1986, as an accountant clerk in the Telecommunications Department. His job was to review OHSU's telephone bills for accuracy, pay them and recoup the payments from the various OHSU departments. He also worked with the individual departments on billing problems, including overpricing, overbilling an fraud. McDonald was the Assistant Director of the Telecommunications Department and plaintiff's supervisor.

In 1990, OHSU instituted a new computerized on-line telephone billing system, and the bill processing center moved from the OHSU campus in Portland to Corvallis. Plaintiff helped implement the new system, and his duties changed. Some of his duties were

eliminated or could be performed by anyone with access to the billing system computer network. He began attending management meetings and making recommendations about problems and projections. He also functioned as a liaison between OHSU and some of the OHSU departments that were not located on the main campus in Portland.

Plaintiff sought a job reclassification, because he was performing duties that fell within a higher classification level. He participated unsuccessfully in a union procedure to gain the reclassification. Plaintiff was told by management that he was not reclassified because there was no existing higher classification job description that matched his new duties, and his supervisor refused to create a new job description. However, he learned that another individual in the Telecommunications Department had been reclassified without a position description.

In September, 1990, plaintiff filed a complaint with OHSU's affirmative action office, because he believed that racial discrimination had caused OHSU to treat his reclassification request differently from

reclassification requests presented by other employees. An OHSU affirmative action officer testified that plaintiff's complaint had presented a prima facie case and that the officer had proposed a settlement whereby plaintiff would be classified at the same level as the other employee who had been reclassified without a job description. However, on December 1, 1990, he day before McDonald was to respond to the affirmative action settlement proposal, plaintiff received a layoff notice.

The notice advised plaintiff that it was necessary to reduce staff because of automation of the billing system and that he would be laid off, effective January 4, 1991. The notice also advised plaintiff that he had various options that would allow him to displace an employee in his or a lower classification. In addition, it said that if he elected

> "to be laid off, [his] name [would] be placed on the full time Layoff List for two years for recall in service credit order to any full time position as an Accounting Tech. for which [he qualified]."

OHSU subsequently extended the effective date of the layoff

to February 8, 1991.

According to testimony presented at trial, there was a clique in Telecommunications Department and minority employees of the department were often left out of the clique. There was also testimony that a pattern of favoritism towards members of the clique existed. Koch, a former manage of the department who had been fired, testified that plaintiff was not "well thought of" by upper management. Koch had the impression that race was a factor in the upper managers' opinions of plaintiff. He said that upper management discussed getting rid of plaintiff by eliminating his position and later recreating it, because management believed that it would be "very difficult to get rid of [plaintiff] because of his race."

After plaintiff received the layoff notice, but before the layoff became effective, OHSU's personnel office assisted plaintiff with finding another job at OHSU. The personnel office notified plaintiff of a vacancy in another department, and he obtained a "try-out" for that job. He completed a 90-day trial period and became a permanent

employee in that job on February 11, 1991. A personnel action form submitted at that time said, "Employee transferring from Telecommunications with layoff status and a 3-mo trial service." Plaintiff's payroll number was changed. He retained the sick and vacation leave that he had accumulated while working in the Telecommunications Department, but lost his seniority.

In its first assignment, OHSU contends that the trial court erred in denying the motion for a directed verdict on plaintiff's section 1981 claim. OHSU asserts that plaintiff was not entitled to relief under the 1988 version of section 1981, because he was not denied a right to make or enforce a contract. See n 2, infra. It also argues that, although plaintiff might have stated a claim for relief under the Civil Rights Act or 1991, that Act was not effective and does not apply retroactively.[2] It essentially argues that the trial court erred because the conduct occurred after plaintiff had entered into an employment contract with OHSU and before the Civil Rights Act of 1991 became effective. OHSU also argues that, because it is a state entity, it could

not be sued as a "person" under section 1981 and punitive damages cannot be awarded against it.

Plaintiff responds that he could have prevailed on his failure to promote theory under 42 USC § 1981 (1988), and that we therefore do not need to determine whether the Civil Rights Act of 1991 applies retroactively. However, for the following reasons, we conclude that plaintiff's failure to promote theory was not actionable under the 1988 version of section 1981.

Only racial discrimination that denies an individual the right to form a contract or enforce established contract obligations is actionable under 42 USC § 1981 (1988). Patterson v. McLean Credit Union, 491 US 164, 171, 109 S Ct 2363, 105 L Ed 2 132 (1989). Although a promotion ordinarily occurs after parties have formed an employment contract, a failure to promote claim is actionable under the 1988 version of section 1981 if the "nature of the change in position was such that it involved the opportunity to enter into a new contract with the employer." 491 US at 185. The addition of supervisory

duties, a change in the manner in which an employment contract can be terminated, or a change from hourly to salaried compensation are characteristics of a promotion that is an opportunity to form a new contractual relationship. Sitgraves v. Allied-Signal, Inc., 953 F2d 570, 573 (9th Cir 1992).

Plaintiff asserts that he presented sufficient evidence to go to the jury on his failure to promote claim, because the evidence showed that he had assumed new duties, his job functions increased, he was working above his classification without being paid for it and "the work included providing high-level advice and administrative support to the organization." He further asserts that the evidence showed that he should have been appointed Tele-Database Administrator or an administrative specialist. However, the reclassification that plaintiff sought was not the equivalent of an opportunity to form a new employment contract with OHSU. Additional pay and duties are typical of an ordinary promotion. Moreover, there is no evidence that, by attending management meetings, he assumed

supervisory duties. In sum, plaintiff's failure to promote theory was not supported by evidence that would allow him to recover under 42 USC § 1981 (1988).

We return to OHSU's argument that the discriminatory conduct established by plaintiff was not actionable under section 1981, because the Civil Rights Act of 1991 does not apply retroactively. The federal circuits are split on whether the Civil Rights Act of 1991 applies retroactively. Compare Estate of Reynolds v. Martin, 985 F2d 470 (9th Cir 1993) (Civil Rights Act of 1991 applies to cases pending at the time of its enactment) with Harvis v. Roadway Exp. Inc., 973 F2d 490 (6th Cir 1992), cert granted in part ___ US ___, 113 S Ct 1250, 122 L Ed 2d 649 (1993) (Civil Rights Act of 1991 does not apply retroactively). In determining whether Congress intended the Civil Rights Act of 1991 to apply retroactively, OHSU urges us to follow the presumption that a statute applies prospectively unless the plain language of the statute requires retroactive application.

We need not resort to that presumption,

because we agree with the Ninth Circuit that the language of the Civil Rights Act of 1991 indicates that Congress intended it to apply retroactively. Section 402(a) of that Act, entitled "Effective Date," reads:

> "IN GENERAL.--Except as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment."[3]

Other sections of the Act indicate that the amendments made by those particular sections do not apply to conduct that occurred prior to enactment. For example, section 109(c) reads:

> "APPLICATION OF AMENDMENTS.--The amendments made by this section shall not apply with respect to conduct occurring before the date of the enactment of this Act." (Emphasis supplied.) Civil Rights Act of 1991, Pub L No. 102-166, § 109(c), 105 Stat 1071, 1078 (1991).

That language indicates that the amendments made by section 109 do not apply retroactively. As the Ninth Circuit reasoned in Estate of Martin, supra, a holding that the Act applies prospectively would make sections such as section 109(c) redundant and would violate the rule of statutory construction that prohibits construing a provision to be

entirely redundant. We conclude that the language of the Civil Rights Act of 1991 indicates that Congress intended the amendments made by the Act to apply retroactively, except where it specifically prohibited retroactive application. Because there is no specific prohibition regarding section 101 of the Act, which is at issue here, it applied retroactively.

Next, OHSU asserts that it is not a "person," under 42 USC § 1981, and therefore was not a proper defendant on plaintiff's section 1981 claim. Plaintiff argues that this issue was not preserved, because OHSU did not make that argument in its motion for a directed verdict. OHSU acknowledges that it failed to raise this issue below, but argues that we should exercise our discretion and review it as an error of law apparent on the face of the record pursuant to ORAP 5.45(2).

In Ailes v. Portland Meadows, Inc., 312 Or 376, 823 P2d 956 (1991), the court set out the procedure and analysis we must follow before reaching an unpreserved claim of error. The error must be one "of law"; it must be

obvious and not reasonably disputed; and we must be able to identify the error from the record without choosing between competing inferences and the facts constituting the error must be irrefutable. 312 Or at 381-82. In addition, even if we conclude that the claimed error meets those requirements, we can review it only by an exercise of our discretion, supported by a written explanation of our reasons for doing so. 312 Or at 382. Assuming without deciding that the claimed error of law is apparent on the face of the record, OSHU has provided no compelling argument why we should exercise our discretion to review it. In the absence of a compelling argument, we decline to do so.

Finally, OHSU argues that plaintiff could not recover punitive damages under his section 1981 claim. OHSU did not raise that argument in its motion for a directed verdict. Instead, it argued only that there was insufficient evidence ot support an award of punitive damages. Again, the claim of error was not preserved, and we decline to review it. See Ailes v. Portland Meadows, Inc., supra.

Because we conclude that the Civil Rights Act of 1991 generally applies retroactively and that OHSU did not propertly preserve its other arguments regarding plaintiff's section 1981 claim, the trial court did not err in denying OHSU's motion for a directed verdict on that claim.

In its second assignment, OHSU asserts that the trial court erred in denying its motion for a directed verdict on the wrongful discharge claim, because plaintiff was never separated from employment at OHSU. It argues that "an unexecuted lay-off notice and subsequent transfer between OHSU departments is, as a matter of law, not the legal equivalent of an employment discharge."

"In every action for wrongful discharge, it must be shown that the plaintiff was discharged." Bratcher v. Sky Chefs, Inc., 308 Or 501, 505, 783 P2d 4 (1989). (Emphasis in orginal.) "[U]nderlying a discharge, direct or constructive, is a dismissal stemming from the employer's intent to be rid of a specific employee or employees." 308 Or at 506. (Emphasis supplied.) Plaintiff was not

dismissed, because his employment relationship with OHSU never ended. The layoff notice sent to plaintiff advised him that, in lieu of a layoff, he could exercise his right to displace another less senior employee and thereby continue to work at OHSU. That the layoff provided plaintiff with an option to continue working at OHSU indicates that OHSU did not intend to terminate his employment. Plaintiff emphasizes that he lost his "seniority rights." However, his loss of seniority resulted from his decision not to displace another worker and instead to seek the vacant position. Because plaintiff failed to prove that he was discharged, the trial court erred in denying OHSU's motion for a directed verdict on the wrongful discharge claim.

In a third assingment of error, McDonald asserts that the trial court erred in denying his motion for a directed verdict on plaintiff's intentional interference with contract claim. McDonald argues that he was acting for the benefit of OHSU and that an employee who acts within the scope of the employee's authority, at least in part for the benefit of the employer, is insulated from liability for

causing an employer to breach an employment agreement.

In "mixed motives" cases, a finding that the defendant acted with a proper motive is a complete defense to an intentional interference with contract claim. Welch v. Bancorp Management Services, 296 Or 208, 675 P2d 172 (1983), mod 296 Or 713, 679 P2d 866 (1984). However, evidence that there was a proper motive does not compel the jury to make that finding, at lease if there is also evidence of an improper motive. In Harm v. Central Life Assurance Co., 107 Or App 708, 714, 813 P2d 1103 (1991), we said that a plaintiff need only provide evidence that, at least in part, a defendant was motivated by an improper objective. Once there is evidence of both proper and improper motives, the trier of fact must decide whether the motives were all proper, all improper or a mixture of both. 107 Or App at 714. Here, plaintiff persented evidence that racial discrimination and retaliation for the affirmative action complaint motivated McDonald to lay off plaintiff. McDonald presented evidence that he was following prescribed procedures under the direction of higher

management and for the benefit of OHSU. Evidence of both improper and proper motives created a question for the trier of fact to decide. Accordingly, the trial court did not err in denying McDonald's motion for a directed verdict on the intentional interference with contract claim.

Judgment against Oregon Health Sciences University on wrongful discharge claim reversed; otherwise affirmed.

FOOTNOTES

1.

In his original and amended complaints, plaintiff included McDonald as a defendant on each of the claims. However, when defendants moved for a directed verdict, plaintiff's counsel removed McDonald as a defendant on the section 1981 claim. The jury returned verdicts on that claim and the wrongful discharge claims against only OHSU.

The trial court adjusted the jury's verdict according to the limitations on general damages and the prohibition on punitive damages for common law tort claims pursuant to ORS 30.270. The final judgment awarded plaintiff $250,000 in general damages and $500,000 in punitive damages, plus reasonable attorneys' fees, costs and disbursements on the section 1981 and wrongful discharge claims against OHSU. It also awarded him $10,000 in general damages plus costs and disbursements against McDonald on the intentional interference with contract claim. Plaintiff does not cross-

appeal from the damage limitations imposed in the judgment.

2.

42 USC § 1981 (1988) provided:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." (Emphasis supplied.)

Section 101 of the Civil Rights Act of 1991, Pub L No 102-166, § 101, 105 Stat 1071, 1072 (1991), broadened the scope of section 1981 by adding the following language:

> "(b) For purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." (Emphasis supplied.)

3. The date of enactment was November 21, 1991. Civil Rights Act of 1991, Pub L No. 102-166, 105 Stat 1071 (1991).

FILED: August 25, 1994

IN THE SUPREME COURT
OF THE STATE OF OREGON

CHARLES MEKKAM,

Petitioner on Review/
Respondent on Review,

v.

OREGON HEALTH SCIENCES
UNIVERSITY, and
DOUGLAS McDONALD,

Respondents on Review/
Petitioners on Review.

(CC 9103-01566; CA A75085;
SC S41206, S41385)

In Banc

On review from the Court of Appeals.*

Submitted on petitions for review filed March 30, 1994, and June 15, 1994.

Richard C. Busse and Scott N. Hunt, Portland, filed the petition for petitioner on review/respondent on review.

Jas. Adams, Assistant Attorney General, Theodore R. Kulongoski, Attorney General, and Virginia L. Linder, Solicitor General, Salem, filed the petition and response for respondents on review/petitioners on review.

MEMORANDUM OPINION

The petitions for review are allowed. The decision of the Court of Appeals is vacated. The case is remanded to the Court of Appeals for further consideration in the light of Rivers v. Roadway Express, Inc., ___ US ___, 114 S Ct 1510, 128 L Ed 2d 274 (1994).

*Appeal from Multnomah County Circuit Court,
Robert P. Jones, Judge.
126 Or App 484, 869 P2d 363 (1994).

MEMORANDUM OPINION

The petitions for review are allowed.[1] The decision of the Court of Appeals is vacated. The case is remanded to the Court of Appeals for further consideration in the light of Rivers v. Roadway Express, Inc., ___ US ___, 114 S Ct 1510, 128 L Ed 2d 274 (1994).

1

Our allowance of both petitions does not represent any opinion as to the validity of any argument asserted by either petitioner.

FILED: January 25, 1995

IN THE COURT OF APPEALS
OF THE STATE OF OREGON

CHARLES MEKKAM,

Respondent,

v.

OREGON HEALTH SCIENCES
UNIVERSITY and DOUGLAS McDONALD,

Appellants.

(9103-01566; CA A75085)

On remand from the Oregon Supreme Court. Mekkam v. Oregon Health Sciences Univ., 319 Or 623, 879 P2d 180 (1994).

Appeal from Circuit Court, Multnomah County.

Submitted on remand September 22, 1994.

Robert P. Jones, Judge.

Jas. Adams, Assistant Attorney General, argued the cause for appellants. With him on the brief were Charles S. Crookham and Theodore R. Kulongoski, Attorneys General, and Virginia L. Linder, Solicitor General.

Richard C. Busse argued the cause for respondent. With him on the brief was Scott N. Hunt.

Before Richardson, Chief Judge,* and De Muniz and Leeson, Judges.

DE MUNIZ, J.

Judgment against Oregon Health Sciences University reversed; judgment against McDonald affirmed.

*Richardson, C.J., vice Rossman, P.J., retired.

DE MUNIZ, J.

This appeal is before use on remand from the Oregon Supreme Court. Mekkam v. Oregon Health Sciences Univ., 319 Or 623, 879 P2d 180 (1994). Plaintiff sued defendant Oregon Health Sciences University (OHSU) under 42 USC § 1981 (section 1981 claim) and for common law wrongful discharge. He also sued his supervisor, defendant McDonald, alleging that McDonald intentionally interfered with an employment contract between OHSU and plaintiff for the improper purpose of racial discrimination. The trial court denied defendants' motions for directed verdicts on plaintiff's claims. The jury found for plaintiff on each of his claims and awarded him general and punitive damages.

Defendants appealed. In our opinion, we concluded that the conduct alleged by plaintiff was not actionable on a failure to promote theory under the 1988 version of 42 USC § 1981,[1] because plaintiff was not denied a right to form a contract or enforce a contractual obligation. See Mekkam v. Oregon Health Sciences Univ., 126 Or App 484, 489, 869 P2d 363 (1994). However, we concluded that section

101 of the Civil Rights Act of 1991, which enlarged the category of conduct that is subject to liability under section 1981, applied retroactively.[2] 126 Or App at 489. Consequently, we held that the trial court did not err in denying OHSU's motion for a directed verdict on plaintiff's section 1981 claim. We also held that the trial court erred in denying OHSU's motion for a directed verdict on plaintiff's wrongful discharge claim, because plaintiff failed to prove that he was discharged. 126 Or App at 493. Finally, we held that the trial court did not err in denying McDonald's motion for a directed verdict on plaintiff's intentional interference with contract claim, because evidence of both improper and proepr motives created a question for the trier of fact to decide. 126 Or App at 493.

After we issued our opinion and plaintiff had petitioned for review by the Oregon Supreme Court, the United States Supreme Court decided that section 101 of the Civil Rights Act of 1991 does not apply retroactively. See Rivers v. Roadway Express, Inc., 511 US ___, 114 S Ct 1510, 128 L Ed 2d 274 (1994). The Oregon Supreme Court

then vacated our decision and remanded for further consideration in the light of that holding.

On remand, we do not reconsider the merits of the parties' arguments concerning the wrongful discharge and intentional interference with contract claims. We expressly adopt and incorporate in this opinion the analysis of those issues that was included in our original opinion. See Mekkam v. Oregon Health Sciences Univ., supra, 126 Or App at 492-93. We also adopt and incorporate into this opinion our analysis and conclusions concerning plaitniff's failure to promote theory. See 126 Or App at 489-92.

Because section 101 of the Civil Rights Act of 1991 does not apply retroactively, and all of the alleged discriminatory conduct occurred before the effective date of that act, we now conclude that plaintiff could not recover under 42 USC § 1981 (1988). Accordingly, the trial court erred in denying OHSU's motion for a directed verdict on plaintiff's section 1981 claim.

Judgment against Oregon Health Sciences University reversed; judgment against McDonald affirmed.

1.

42 USC § 1981 (1988) provided:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

2.

Section 101 of the Civil Rights Act of 1991, Pub L No 102-166, § 101, 105 Stat 1071, 1972 (1991), added the following language to section 1981:

> "(b) For purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."

FILED: January 25, 1995

IN THE COURT OF APPEAL
OF THE STATE OF OREGON

CHALRES MEKKAM,

Respondent,

v.

OREGON HEALTH SCIENCES
UNIVERSITY and DOUGLAS McDONALD,

Appellants.

(9103-01566; CA A 75085)

On remand from the Oregon Supreme Court. Mekkam v. Oregon Health Sciences Univ., 319 Or 623, 879 P2d 180 (1994).

Appeal from Circuit Court, Multnomah County, Robert P. Jones, Judge.

Jas. Adams, Assistant Attorney General, attorney for appellants.

Richard C. Busse attorney for respondent.

Before Richardson, Chief Judge,* De Muniz and Leeson, Judges.

DE MUNIZ, J.

Judgement against Oregon Health Sciences University reversed; judgment against McDonald affirmed.

*Richardson, C.J., vice Rossman, P.J., retired.

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Appellant OHSU as to respondent; respondent as to appellant McDonald

[ ] No costs allowed.
[X] Costs allowed, payable by: Respondent as to appellant OHSU; appellant McDonald as to Respondent

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MONEY JUDGMENT

Judgment #1

Creditor: Oregon Health Sciences University

Debtor: Charles Mekkam

Costs: $200.00

Attorney fees: -0-

TOTAL AMOUNT $200.00

Interest: Simple, 9% per annum, from the date of this appellate judgment.

MONEY JUDGMENT

Judgment #2

Creditor: Charles Mekkam

Debtor: Douglas McDonald

Costs: $160.00

Attorney fees: -0-

TOTAL AMOUNT: $160.00

Interest: Simple, 9% per annum, from the date of this appellate judgment.

Appellate Judgment
Effective Date: August 8, 1995

COURT OF APPEALS
(seal)

IN THE SUPREME COURT
OF THE STATE OF OREGON

CHARLES MEKKAM,	) Multnomah County
	) Circuit Court
Plaintiff-Respondent,	) No. 9103-01566
Petitioner on Review,	)
	) ORDER
v.	) DENYING
	) REVIEW
OREGON HEALTH SCIENCES	)
UNIVERSITY and	) CA A75085
DOUGLAS McDONALD,	) SC S42071
	)
Defendants-Appellants,	)
Respondents on Review.	)

The Court has considered the petition for review and ORDERS that it be denied.

Dated this 16th day of May, 1995.

/s/ Wallace P. Carson Jr.
WALLACE P. CARSON, JR.
CHIEF JUSTICE

Durham, J., would allow

IN THE SUPREME COURT
OF THE STATE OF OREGON

CHARLES MEKKAM,	)	Multnomah County
	)	Circuit Court
Plaintiff-Respondent,	)	No. 9103-01566
Petitioner on Review,	)	
	)	ORDER DENYING
v.	)	RECONSIDERATION
	)	
OREGON HEALTH	)	CA A75085
UNIVERSITY and	)	SC S42071
DOUGLAS McDONALD,	)	
	)	
Defendants-Appellants,	)	
Respondents on Review.	)	

The court has considered the petition for reconsideration and orders that it be denied.

Dated this 18th day of July, 1995.

/s/ Wallace P. Carson Jr.
WALLACE P. CARSON, JR.
CHIEF JUSTICE

Durham, J. would allow